tion for a subsidy. She testified that she only made one trip to the land office and she was not accompanied by the third defendant but by two unknown male Malays. At the land office, she only met DW5, apart from the two male Malays, and she also testified that she would not have signed such forms had she known that she was transferring her only property to the defendants. She denied meeting the defendants and the petition writer, DW3, and this may well explain why DW3 wrongly identified PW1 in court as being the plaintiff.

There can be no doubt whatsoever that the document the plaintiff signed was Form 14A, AB14, as being the recipient of a subsidy for manure; it does not stand to reason that she should make a further application for such a subsidy. To that extent, DW5 had blatantly misrepresented the true facts to both the plaintiff and PW1 and his evidence that he only interpreted whatever was told to him by the Assistant District Officer, DW4, before whom the transfer was executed, cannot be believed.

Perhaps the most telling evidence that had surfaced in this case is the attempt made by the first defendant to transfer his share of the property to his wife after this suit was filed, so as to defeat the plaintiff's claim. He had also tried to get his two brothers, the second and third defendants to do likewise. The first defendant's excuse for doing so was that he was getting old and being a drunkard, he feared that he might transfer the land to some third party, without him being fully aware of the consequences of his action. However, when cross-examined why he did not attempt to transfer another piece of land that he owned to his wife, he was not able to give any satisfactory answer. Bearing in mind that at the time of such attempted transfer this suit has already been filed and served on him, there is no doubt whatsoever that his motive for doing so was nothing more than to defeat the plaintiff's claim.

Since the plaintiff seeks to impeach the defendants' title to the property on the ground that the transfer was obtained fraudulently under s 340(2)(a) of the National Land Code, the burden of proving fraud is the criminal law burden of proof beyond a reasonable doubt (*Saminathan* v *Pappa*[1]) and that all particulars of fraud must be set out in detail.

The only particulars appearing in the statement of claim are those found in para 6 where there is an allegation that the defendants employed the services of third parties to force the plaintiff to transfer the property to them. Although the pleadings are wanting in that they do not set out other particulars of fraud, the evidence, however, clearly shows that other instances of fraud have occurred but since no objection was raised by Mr Davidason, counsel for the defendants, in the course of the trial of the lack of particulars in the pleadings, I can only assume that his clients have not been in any way prejudiced by the lack of particulars. Be that as it may, since there is overwhelming evidence that the transfer was not executed with the plaintiff's consent as she was not made aware that she was transferring her property to the defendants, an intention that runs contrary to that expressed by her in P1, and bearing in mind the whole circumstances of this case, it is my considered opinion that the insufficient particulars should not be a bar to the plaintiff's claim. As there is overwhelming evidence to establish fraud, it is only just and fair that the omission on the part of solicitors should not be a bar to her succeeding in this suit.

Likewise, since the plaintiff also seeks to disown the instrument of transfer, AB14-16, the burden of establishing so lies with her. Although this plea of non est factum has not been specifically pleaded by her, nonetheless no objection was taken by the defendants and since fraud has been established from the evidence, there is nothing to suggest that she had been in any way negligent when affixing her thumb-print to the transfer.

Since the plaintiff's concern is that the instrument of transfer dated 22 March 1984 be declared null and void, I accordingly make such an order and further direct that the Land Administrator, Kuala Selangor restore the plaintiff as the registered proprietress of the land. The defendants shall also bear the costs of this suit.

Order accordingly.

Solicitors: *Matthew Thomas & Co*; *Syarikat Davidason.*

Reported by *Gabriel Sebastian*

Public Prosecutor v Low Kok Wai

HIGH COURT (PENANG) – CRIMINAL TRIAL NO 58-10-86
MOHAMED DZAIDDIN J
25 JANUARY 1988

Criminal Procedure – Sentencing – Drug trafficking offence committed before April 1983 – Discretion of court to sentence accused to death or imprisonment for life – Principles applicable

The accused pleaded guilty to a charge of drug trafficking under the Dangerous Drugs Act 1952. As the offence was committed on 12 August 1982, ie before April 1983, the law gave the court a discretion to sentence the accused to death or imprisonment for life and whipping. On sentencing the accused to death by hanging, the court elaborated on the applicable sentencing principles.

Held: (1) Other than in the most exceptional circumstances, a sentence of death should be imposed to show the gravity of the offence and public disapproval, to punish the offender and most of all to protect the public.

(2) The extent to which a plea of guilty is a mitigating factor must depend on the facts of each case and it cannot be a powerful mitigating factor when effectively no defence to the charge was available to the accused. In the present case, there would be no effective defence to the charge had the accused not pleaded guilty and all the factors taken together could not constitute the most exceptional circumstances.

Case referred to
1 *R* v *Davis* (1980) 2 Cr App R (S) 168 (refd)

Josephine Sivaretnam (Ms) for the Public Prosecutor.
R Rajasingam for the accused.

Cur Adv Vult

Mohamed Dzaiddin J: The accused was charged before me as follows:

> That you on 12 August 1982 at about 5.55 pm at the International Airport, Bayan Lepas in the District of Balik Pulau, in the state of Penang, did on your own behalf traffic in a dangerous drug, to wit heroin weighing 1979.3 grammes and that you have thereby committed an offence under s 39(B)(1)(a) of the Dangerous Drugs Act 1952 and punishable under s 39(B)(2) of the same Act.

He claimed trial to the charge. However, after four prosecution witnesses have given evidence, the accused through his counsel, Mr Rajasingam, informed me that he would like to change his plea to one of guilty. I then ascertained through the Chinese interpreter whether he understood the consequences of his change of plea. He replied 'yes'. After considering the prosecution evidence thus far, I was satisfied that the accused knew the consequences of his plea of guilty. The learned deputy public prosecutor then submitted the brief facts of the prosecution case which he also admitted. Hence, under the above circumstances I found the accused guilty as charged and I convicted him.

On 22 January 1988, I heard submissions from counsel and the deputy public prosecutor on mitigation of sentence. The accused was 22 years 11 months old at the time of the arrest. He is the eldest in a family of five and before the arrest he was a construction worker. He is a first offender. His international Malaysian passport (P2) showed that he had travelled to Thailand and Singapore on a few occasions in 1981 and 1982 and at the material time of his arrest he was making his first visit to Europe, ie to Innsbruck, Austria. He was in possession of airline tickets for Penang/Singapore/Frankfurt and Frankfurt/Innsbruck return. He had also cash of U$S1,000.

From the evidence, I am satisfied that at the time of his arrest the accused was carrying a substantial amount of heroin, ie 1,979.3 grammes, concealed underneath a well-packed travelling bag. I concede that he was a courier, but it is evident from the airline tickets and his personality that he was part of an international syndicate dealing in drugs from Malaysia for European destinations. In the circumstances of this case, I must reject the defence submission that the accused was a 'victim of circumstances' in that he was lured to go to Austria looking for a job and carrying a luggage not knowing its content. I am equally satisfied that he knew what he was carrying and that the accused had custody and control of the drug in the baggage at the time of his arrest.

As the accused committed this offence before April 1983, the law then gave me a discretion to sentence him on conviction with either death or imprisonment for life and whipping. A certain guideline is laid down by the then Federal Court on sentencing. The gist is that other than in the most exceptional circumstances, a sentence of death should be imposed to show the gravity of the offence, public disapproval, to punish the offender and most of all to protect the public. In the present case, the only mitigating factor is the accused's plea of guilty. It is a principle of sentencing that whenever possible the court should take into account as a mitigating factor the fact that the accused has pleaded guilty. The extent to which a plea of guilty is a mitigating factor must depend on the facts of each case, and it cannot be a powerful mitigating factor when effectively no defence to the charge was available to the accused (see *Archbold*, 42nd Ed, para 4-480 citing *R* v *Davis*[1]). In the present case, I accept the accused's change of plea to be a mitigating factor. However, bearing in mind his modus operandi; the concealment of the drug in his travelling bag which was professionally done; its substantial weight; and that there would be no effective defence to the charge had the accused not pleaded guilty, in my judgment, the effect of his plea of guilty would not be a powerful mitigating factor. Further, these factors cannot constitute what the Federal Court has termed as 'the most exceptional circumstances'. For these reasons, I sentence the accused to death by hanging.

Convicted accordingly.

Solicitors: *Rajasingam & Co.*

Reported by *Ng Sheau Jiuan*